



October 15, 2021

Submitted via FOIAOnline

Regional Freedom of Information Officer
U.S. Environmental Protection Agency, Region 2
290 Broadway, 26th Floor
New York, NY 10007-1866
(212) 637-3668

**Re: Freedom of Information Act Request for Documents Regarding
New York's Adoption of the Environmental Benefit Permit
Strategy**

Dear Regional Freedom of Information Officer:

In 1994, New York modified its Clean Water Act NPDES permitting program to incorporate the "Environmental Benefit Permitting Strategy" under which New York administratively renews NPDES permits every five years and does a full "technical review" of permits according to a priority ranking system. Earthjustice is seeking documentation relating to this change to New York's delegated Clean Water Act NPDES permitting program. Earthjustice submits this request for records in accordance with the provisions of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and the implementing regulations of the U.S. Environmental Protection Agency ("EPA"), 40 C.F.R. Part 2. The focus of this request is records relating to the New York State Department of Environmental Conservation's adoption of the Environmental Benefit Permit Strategy for its delegated Clean Water Act § 402 permitting program.

Earthjustice requests a fee waiver for this FOIA request.

RECORDS REQUESTED

For purposes of this request, the term "records" means information and documents of any kind, including, but not limited to: documents, letters, e-mails, memoranda, correspondence, minutes of meetings and summaries of telephone conversations. For purposes of this request, references to "New York" shall encompass any state government agency in New York, including but not limited to the New York Attorney General and the New York Department of Environmental Conservation.

Specifically, we seek:

- 1) All correspondence between EPA and New York regarding New York's Clean Water Act delegated NPDES (or SPDES) program, including New York's "Environmental Benefits Permit Strategy" or "EBPS" between January 1, 1993 and January 1, 1996.
- 2) Any correspondence from New York to EPA that discusses or mentions changes to New York's delegated Clean Water Act NPDES permitting program between January 1, 1993 and January 1, 1996.

- 3) Any Attorney General's statement EPA received from New York regarding New York's Clean Water Act NPDES permitting system (or SPDES program) between January 1, 1993 and January 1, 1996.
- 4) Any Memorandum of Agreement between New York and EPA regarding New York's Clean Water Act NPDES permitting program that was effective between January 1, 1993 and January 1, 1996.
- 5) Any formal or informal determination by EPA regarding New York's Environmental Benefit Permit Strategy.
- 6) Any public notice EPA published in the Federal Register and any public notice published in any newspaper in New York regarding New York's Environmental Benefit Permit Strategy.
- 7) Any approval or disapproval by the EPA Administrator of New York's Environmental Benefit Permit Strategy.
- 8) Any "notice of approval" of the Environmental Benefit Permit Strategy given in a letter from the EPA Administrator to New York's Governor or otherwise to New York.

RECORD DELIVERY

To the extent practicable, Earthjustice requests electronic copies of the above documents. If the documents are to be produced in hard copy, we have staff members in the Washington, D.C. area who could obtain the documents directly from EPA Headquarters, if necessary.

If any information requested herein was, but is no longer, in EPA's possession or subject to its control, state whether it is (a) missing or lost, (b) has been destroyed, (c) has been transferred voluntarily or involuntarily to others, or (d) otherwise disposed of, and in each instance, explain the circumstances surrounding and authorization for such disposition of it and state the date or approximate date of it.

FEE WAIVER REQUEST

Pursuant to 5 U.S.C. § 552(a)(4)(A)(iii), we request a fee waiver because "disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1). EPA examines four factors when considering whether a request contributes to public understanding: 1) the subject of the request; 2) the informative value of the information being disclosed; 3) the contribution to an understanding of the subject by the public is likely to result from disclosure; and 4) the significance of the contribution to public understanding. *See* 40 C.F.R. § 2.107(l)(2). Additionally, to determine whether the request "is not primarily in the commercial interest of the requester" the government will consider two factors: 1) The existence and magnitude of a commercial interest and 2) the primary interest in disclosure. *See id.* § 2.107(l)(3).

As demonstrated below, each of the factors related to the fee waiver requirements specified in EPA's FOIA regulations weighs in favor of granting our fee waiver request. 40 C.F.R. § 2.107(l). Moreover, federal courts have held that FOIA "is to be liberally construed in favor of waivers for noncommercial requesters." *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Health & Human Servs.*, 481 F. Supp. 2d 99, 106 (D.D.C. 2006) (quoting *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987)).

A. The Request is in the Public Interest.

Factor 1: The Request Seeks Information That Has a "Direct and Clear" Connection to Operations or Activities of the Federal Government.

The first factor for a fee waiver requires that the subject of the request "concern[s] identifiable operations or activities of the Federal government, with a connection that is direct and clear, not remote." 40 C.F.R. § 2.107(l)(2)(i). This request seeks records that relate to EPA's oversight responsibilities of a state-delegated Clean Water Act permitting program. Under the Clean Water Act, EPA has a responsibility to review revisions to delegated programs and provide an opportunity for public comment on substantial revisions. *See* 40 C.F.R. § 123.62. The request seeks information about EPA's review of New York's adoption of the Environmental Benefit Permitting Strategy. Therefore, the requested records have a direct and clear connection to operations and activities of the federal government.

Factor 2: Disclosure of the Requested Records is "Likely to Contribute" to Public Understanding of Government Operations or Activities.

The next factor EPA considers is whether disclosure of the requested records is "likely to contribute" to an "understanding of government operations or activities." 40 C.F.R. § 2.107(l)(2)(ii). To satisfy this requirement, the disclosable records must be "meaningfully informative about government operations or activities." *Id.* Information not "already . . . in the public domain" is considered more likely to contribute to an understanding of government operations or activities. *Id.*

Here, the records being sought will increase our understanding of EPA's exercise of its oversight responsibilities under the Clean Water Act with respect to New York's delegated program. This information is not already accessible through EPA's website or otherwise in the public domain.

Factor 3: Disclosure of the Requested Records Will Contribute to "Public Understanding" of EPA's Oversight of New York's Clean Water Act Program

EPA next considers whether disclosure will contribute to "public understanding" of the subject. *Id.* § 2.107(l)(2)(iii). To qualify for a fee waiver, disclosure should "contribute to the understanding of a reasonably broad audience of persons interested in" the subject matter of the FOIA request, as opposed to the "individual understanding" of the requester. *Id.* In evaluating a fee waiver request, EPA considers whether the requester has "expertise in the subject area and ability and intention to effectively convey information to the public." *Id.* Federal courts have

held that public interest groups satisfy this requirement where they demonstrate an “ability to understand and disseminate the information.” *Judicial Watch, Inc. v. Dep’t of Justice*, 122 F. Supp. 2d 5, 10 (D.D.C. 2000). Here, Earthjustice’s expertise in water pollution issues and track record of conveying this expertise to the public weigh in favor of granting of a fee waiver.

Earthjustice is a national nonprofit environmental law organization dedicated to protecting the magnificent places, natural resources, and wildlife of this earth, and to defending the right of all people to a healthy planet. Earthjustice works at the regional and national level to ensure widespread protections from pollution and exposure to toxic chemicals. Earthjustice has successfully advocated for limiting water pollution from polluting activities and cleaning up polluted waters. Earthjustice has also engaged the public in clean water advocacy; after Earthjustice helped generate more than 150,000 comments in favor of clean water, in 2013 EPA proposed steam electric effluent limitation guidelines for power plants. Additionally, Earthjustice attorneys regularly write blog posts about environmental issues including water quality.

Disclosure of the requested records will allow Earthjustice to assess how EPA exercised its oversight responsibilities in regards to New York’s delegated Clean Water Act program. Earthjustice will draw on its institutional expertise to analyze the interaction between EPA and New York, and it can educate its members and the general public on these matters via its website, blog postings, social media postings, weekly electronic mailings to members, and earned media coverage in newspaper, radio and television.

For these reasons, Earthjustice is well-situated to contribute to public understanding of the subject area, and therefore satisfies this factor in its request for a fee waiver.

Factor 4: Disclosure of the Requested Records Will Make a “Significant” Contribution to the Public’s Understanding of the Process by Which New York Adopted the EBPS

The fourth factor EPA considers is whether the records are “likely to contribute ‘significantly’ to public understanding of government operations or activities.” 40 C.F.R. § 2.107(l)(2)(iv); *see also Fed. CURE v. Lappin*, 602 F. Supp. 2d 197, 205 (D.D.C. 2009) (the relevant test is whether public understanding will be increased after disclosure, as opposed to the public’s understanding prior to the disclosure). Where information is not currently available to the general public, and where “dissemination of information . . . will enhance the public’s understanding,” the fourth public interest factor is satisfied. *Fed. CURE*, 602 F. Supp. 2d at 205.

Here, the request satisfies the fourth factor because at present because the communications between EPA and New York regarding the Environmental Benefit Permitting Strategy are not publicly available, and EPA did not publish a notice in the Federal Register when considering revisions to New York’s Clean Water Act program. Given that so little is information is publicly available about this topic, disclosure of the requested records will inevitably make a “significant” contribution to public understanding in this regulatory area.

B. There is no Commercial Interest in Disclosure of the Requested Records

This request also meets the second fee waiver requirement because the request “is not primarily in the commercial interest of the requester.” 40 C.F.R. § 2.107(l)(1). Earthjustice is a 501(c)(3) nonprofit organization and does not have any “commercial interest that would be furthered by the requested disclosure” of information.¹ *Id.* § 2.107(l)(3)(i). Indeed, Earthjustice’s sole interest in obtaining the requested information is to broaden public understanding of EPA’s oversight of New York’s Clean Water Act program, and to undertake advocacy efforts aimed at protecting New York State’s waters if appropriate.

* * *

For the foregoing reasons, Earthjustice is entitled to a fee waiver for this request. In the event that fees are not waived, please notify and inform us of the basis for your decision, as required by FOIA.

CONCLUSION

Per FOIA and EPA regulations, we expect a reply within twenty working days, *see* 5 U.S.C. § 552(a)(6)(A)(i); 40 C.F.R. § 2.104(a), and at minimum this reply “must . . . indicate within the relevant time period the scope of documents [EPA] will produce.” *Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm’n*, 711 F.3d 180, 182–83 (D.C. Cir. 2013). We appreciate your expeditious help in obtaining the requested information. Please promptly make available copies of all requested records, either through the FOIA Online system, or via email at the contact information below:

Hillary Aidun
Earthjustice
Email: haidun@earthjustice.org

If you find that this request is unclear or if the responsive records are voluminous please contact me at (212) 284-8040 to discuss the proper scope of this request.

Thank you in advance for your assistance with this matter.

Sincerely,

/s/ Hillary Aidun
Hillary Aidun

¹ Indeed, the legislative history of the fee waiver provision reveals that it was added to FOIA “in an attempt to prevent government agencies from using high fees to discourage certain types of requesters, and requests,” in particular those from journalists, scholars and nonprofit public interest groups. *See Ettlinger v. FBI*, 596 F. Supp. 867, 872 (D. Mass. 1984).